Sykt Rodziah (sued as a firm) v Malayan Banking Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02(IM)(NCVC)-1371–07 OF 2018
AHMADI ASNAWI, ABDUL KARIM AND SURAYA OTHMAN JJCA
9 FEBRUARY 2021

Civil Procedure — Striking out — Application for — Banking facilities granted to borrower by bank — Default on repayment — Action for recovery of loan against borrower and guarantors — Bank ('respondent') commenced action against valuer and panel solicitors alleging breach of contract, negligence, fraud and conspiracy — Whether panel solicitors involved in respondent 's decision-making process to grant banking facilities to borrower — Whether respondent's employee negligent in granting banking facilities — Whether plaintiff was issue switching and forum shopping — Whether respondent's claim obviously unsustainable — Whether respondent's claim scandalous, frivolous and/or vexatious — Whether plain and obvious case for striking out

Civil Procedure — Appeal — Appeal against decision of High Court — Bank ('respondent') commenced action against valuer and panel solicitors alleging breach of contract, negligence, fraud and conspiracy — Whether High Court judge erred in deciding bank's claim obviously unsustainable — Whether High Court judge erred in law and/or in fact in failing to appreciate that bank was issue switching and forum shopping — Whether appellate intervention warranted

This was the appellant ('second defendant') appeal against the order of the High Court in dismissing the second defendant's application vide encl 15 to strike out the respondent's ('plaintiff') claim on the grounds that the plaintiff's claim was scandalous, frivolous and vexatious and/or an abuse of process pursuant to O 18 r 19(1)(b), (c) and/or (d) of the Rules of Court 2012 ('the ROC 2012'). The plaintiff was a licensed financial institution. The borrower, Sentosa Timber Trading Sdn Bhd ('STT') approached the plaintiff to obtain financing for, inter alia, the purchase of two units of 1 1/2 storey detached industrial buildings at Taman Industri Sri Sulong and working capital ('properties'). The plaintiff through Ms Saraswati Periasamy ('Ms Saraswati') by a letter ('the letter of offer') approved and granted banking facilities to STT for the total sum of RM5.9m ('the banking facilities'). The plaintiff instructed the first defendant, a partnership carrying out a practice of valuation and estate agency, to carry out the valuation of the properties. Pursuant to the plaintiff's instructions, the first defendant provided the plaintiff with two valuation reports of the properties ('valuation reports'). Based on the representation and/or valuations of the properties provided by the first defendant, the plaintiff

A approved the banking facilities to the borrower. Vide a letter of instruction, the plaintiff through Ms Sarawasti notified the appellant ('second defendant'), a firm of solicitors who were the plaintiff's panel of lawyers, that STT 'had been granted banking facility' and instructed the second defendant to prepare the necessary documents related to the banking facilities. The second defendant B then prepared the loan documentation as per the plaintiff's instruction,and advised the plaintiff that it could release the banking facilities to STT if it was satisfied that STT had fulfilled all the necessary condition precedents. The plaintiff proceeded with the same. STT defaulted in payment of the loan and the plaintiff filed a suit for the recovery of the loan/debt from STT and its C directors/guarantors ('recovery/debt action'). The plaintiff was not able to recover the debt from STT and the directors/guarantors. The plaintiff then filed a suit against the first and second defendants at the High Court. The plaintiff alleged that the valuations of the properties were negligently and erroneously prepared by the first defendant in that the first defendant had D grossly, deliberately and unreasonably inflated the market value of the properties without any basis with intention to deceive and mislead the plaintiff and consequently the first defendant had committed fraud. The plaintiff alleged that the second defendant had, inter alia, in breach of its retainer, wrongfully and recklessly advised the plaintiff to release the banking facilities to E STT without any proper verification in that the second defendant did not investigate and/or made inquiries and/or searches on the properties. Consequently, the plaintiff further alleged that the first and second defendants had conspired to commit fraud on the plaintiff for the benefit and financial gain for themselves, STT, the directors and the vendor. The High Court ('HC') F dismissed encl 15, holding that the plaintiff's claim was not 'obviously unsustainable'. Hence the present appeal.

Held, allowing the appeal, with costs:

G (1) It was clear from the letter of instruction and offer letter that the second defendant was not involved in the plaintiff's decision-making process to grant the banking facilities to STT. The second defendant was not involved in determining the creditworthiness of STT and its directors or guarantors. The plaintiff had its own internal processes to scrutinise the H application for the banking facilities and the granting of the same was ultimately decided by the plaintiff. From the letter of instruction, it was apparent that the second defendant's duty was limited to the preparation of the necessary loan documentation (see para 38).

I (2) The second defendant was not involved in the preparation of the sale and purchase agreement ('SPA') for RM7m nor was it aware of the SPA for RM432,000 for the same properties. The SPA for the properties between STT (the purchaser) and one Ding Kuai Bing @ Lim Kui Ming (the vendor) for the purchase price of RM7m was prepared by another solicitor and not by the second defendant. The SPA for RM7m was the

only SPA the second defendant had received from the plaintiff and the second defendant was not aware that there was another SPA for a lesser purchase price of RM432,000 (the second SPA) for the same properties. Since both the SPAs were not prepared by the second defendant, the second defendant could not have known that the price of the properties was overvalued. That knowledge should be imputed to the solicitor who prepared the SPAs and the valuer who valued the properties (the first defendant) and not the second defendant (see para 39).

(3) In the present appeal, the SPA had been executed before the plaintiff had approved the banking facilities for RM5.9m to STT. In the circumstances, the second defendant could presume that the SPA which STT had entered into with the vendor had been ascertained by the plaintiff to be valid. There was no duty cast on the second defendant to ensure that the SPA was free from any legal infirmity. The duty rested on the plaintiff. Therefore, the HCJ had erred in law and/or in fact in failing to appreciate that there was no duty on the part of the second defendant to investigate or enquire into the valuation of the properties or the legality of the SPAs given the fact that the SPAs were never prepared by the second defendant and that the second defendant's duty or their retainer was limited only to the preparation of the banking facilities/security documentation (see para 41).

(4) The plaintiff pleaded that there was evidence of fraud and/or conspiracy/collusion between the second defendant and/or the first defendant and/or STT/STT's directors and/or the vendors. However, no particulars of fraud or conspiracy were pleaded between the second defendant and/or the first defendant or STT/STT's directors or vendors or any other third parties. This made the claim for fraud and/or collusion/conspiracy against the second defendant unsustainable (see para 44).

(5) The HC had erred in law and/or in fact in failing to appreciate that the plaintiff was in fact, issue switching and forum shopping in initiating its claim against the second defendant. This was so since from the outset and prior to filing the claim against the first and the second defendants, the plaintiff had commenced proceedings in the High Court ('recovery/debt action') against STT and its guarantors and in that claim, the plaintiff had treated the banking facilities as regular and valid and no assertions of collusion were made that STT, through its directors, had colluded or conspired with the first and the second defendants in order that it could achieve a wrongful gain from the plaintiff in the manner now asserted by the plaintiff in this claim against the second defendant under appeal (see para 45).

(6) The recovery/debt action was filed solely on STT's indebtedness. The plaintiff could have pleaded conspiracy or collusion by STT, STT's

directors, guarantors, the valuers and the second defendant but the plaintiff had failed to do so. Instead, the plaintiff elected to treat the banking facilities as valid and regular. The plaintiff obtained a judgment in default of appearance for with interest and costs. The plaintiff then commenced execution proceedings and made STT's directors bankrupt. Unable to recoup its losses, the plaintiff filed this action under appeal against the first and second defendants, changing its stance and taking a different position or direction from its previous action that of a pure debt recovery based solely on indebtedness to one based on negligence, fraud, conspiracy and collusion against the first and second defendants. Once it was established that a party had adopted a particular stance in an action before the court, it was estopped from changing that stance in another action, and its admissions in pleadings would amount to judicial admissions admissible against it (see para 46).

(7) The decision to dismiss Ms Saraswati was made approximately over a year before the claim pertaining to this appeal was filed. Her dismissal which was made on the basis of negligence, the recovery/debt action against STT, STT's directors and guarantors and the present action against the first and second defendants under appeal showed the contradictory positions taken by the plaintiff. The dismissal also clearly showed the plaintiff's admission or acknowledgment that its own employee was negligent in granting the banking facilities to STT. There was no suggestion then that the plaintiff was a victim of a fraudulent scheme involving STT, its directors, vendor and the first and second defendants (see para 52).

(8) The conduct of the plaintiff in changing its stance in that when it initially filed its recovery/debt action, it was based on STT's indebtedness; then its basis for dismissal of Ms Saraswati including its response to the dismissal proceedings initiated by Ms Saraswati in the Industrial Court proceedings, it was based on its admission of negligence by Ms Saraswati and its last action against the first and second defendants which was based on breach of retainer by the second defendant in wrongfully advising the plaintiff to release the banking facilities to STT without proper verification or investigation on the properties and the allegation of breach of contract, fraud, collusion or conspiracy committed by the first and second defendants with STT as the purchaser of the properties and borrower of the banking facilities and the vendor: all these revealed that the plaintiff's claim under appeal was scandalous, frivolous and/or vexatious and was in fact an attempt by the plaintiff to forum shop and issue switch. In such a scenario, due to the different and opposing stance taken by the plaintiff, the plaintiff should be estopped and the claim should be struck out and dismissed (see para 53).

(9) The plaintiff's claim was also an abuse of process. The plaintiff's claim was an attempt by the plaintiff to salvage its position in relation to the monies due and owing under the banking facilities. This was so since in the recovery/debt action, the plaintiff had sought to recover RM15,776,694.08 with interest against STT and the directors as monies due and owing under the banking facilities ('judgment sum'). The plaintiff failed to recover the judgment sum and had commenced execution proceedings against STT and the directors for the same. The plaintiff then sought to recover from the second defendant the amount outstanding from the judgment sum due and owing by STT, which amounted to RM5,784,473.12 despite the fact that by its own admission through Ms Saraswati, the plaintiff had acknowledged that the losses suffered by them were due to their own employee's negligence in approving the loan facilities to STT without reference to the SPA executed by STT as the purchaser and the vendor and not perusing the valuation report made by the first defendant. The plaintiff had knowledge that the properties were already paid for by STT and registered in the name of STT before the approval by them of the monies for the banking facilities. All these showed that the plaintiff's claim was an attempt to forum shop in the context of a 'tactical manoeuvre'. Therefore, the present action ought to be struck out for abuse of court process (see para 55).

[Bahasa Malaysia summary

Ini adalah rayuan perayu ('defendan kedua') terhadap perintah Mahkamah Tinggi dalam menolak permohonan defendan kedua melalui lampiran 15 untuk membatalkan tuntutan responden ('plaintif') atas alasan bahawa tuntutan plaintif adalah menyusahkan, dan/atau merupakan penyalahgunaan proses mahkamah menurut A 18 k 19(1)(b), (1)(c) dan/atau (1)(d) Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Plaintif adalah sebuah institusi kewangan berlesen. Peminjam, Sentosa Timber Trading Sdn Bhd ('STT') telah memohon daripada plaintif untuk mendapatkan pembiayaan pinjaman, antara lain, untuk pembelian dua unit bangunan perindustrian 1 1/2 tingkat di Taman Industri Sri Sulong dan modal kerja ('hartanah tersebut'). Plaintif melalui Cik Saraswati Periasamy ('Cik Saraswati') melalui surat ('surat tawaran') telah meluluskan dan memberikan kemudahan pinjaman kepada STT dengan jumlah keseluruhan RM5.9 juta ('kemudahan pinjaman tersebut'). Plaintif telah mengarahkan defendan pertama, yang merupakan sebuah perkongsian yang menjalankan penilaian dan agensi harta pusaka, untuk menjalankan penilaian hartanah tersebut. Berdasarkan arahan plaintif, defendan pertama telah menyediakan kepada plaintif dua laporan penilaian hartanah ('laporan penilaian tersebut'). Berdasarkan penilaian hartanah yang disediakan oleh defendan pertama, plaintif telah meluluskan kemudahan pinjaman tersebut kepada peminjam. Melalui surat arahan tersebut, plaintif melalui Cik Sarawasti memberitahu perayu ('defendan kedua'), sebuah firma

guaman yang merupakan panel peguam plaintif, bahawa STT 'telah diberikan kemudahan pinjaman' dan mengarahkan defendan kedua untuk menyediakan dokumen-dokumen yang berkaitan dengan kemudahan pinjaman tersebut. Defendan kedua kemudian menyediakan dokumentasi pinjaman mengikut arahan plaintif yang menasihatkan plaintif bahawa mereka boleh meluluskan pinjaman tersebut kepada STT sekiranya berpuas hati bahawa STT telah memenuhi semua syarat yang diperlukan. Plaintif juga melakukan perkara yang sedemikian. STT kemudiannya telah gagal membayar pinjaman tersebut dan plaintif memfailkan saman bagi mendapatkan semula pinjaman/hutang daripada STT dan pengarah/penjaminnya ('tindakan tersebut'). Plaintif masih gagal mendapatkan semula hutang daripada STT dan pengarah/penjaminnya. Plaintif kemudiannya memfailkan saman terhadap defendan pertama dan kedua di Mahkamah Tinggi. Plaintif mendakwa bahawa penilaian hartanah dilakukan secara cuai oleh defendan pertama dan defendan pertama dengan sengaja dan tidak munasabah menaikkan nilai pasaran hartanah tersebut tanpa sebarang asas dengan niat untuk menipu dan mengelirukan plaintif dan oleh yang demikian, defendan pertama juga telah melakukan penipuan. Plaintif mendakwa bahawa defendan kedua telah, antara lain, secara salahnya menasihati plaintif untuk melepaskan kemudahan pinjaman kepada STT tanpa sebarang justifikasi. Defendan kedua juga tidak menyiasat dan/atau membuat pertanyaan dan/atau carian ke atas harta tersebut. Oleh yang demikian, plaintif juga mendakwa bahawa defendan pertama dan kedua telah bersubahat untuk melakukan penipuan ke atas plaintif untuk manfaat dan keuntungan kewangan untuk diri mereka sendiri, STT, pengarah dan vendor tersebut. Mahkamah Tinggi ('MT') telah menolak lampiran 15 tersebut atas alasan bahawa tuntutan plaintif bukanlah 'tidak dapat dipertahankan dengan jelas'. Oleh itu rayuan ini difailkan.

Diputuskan, membenarkan rayuan dengan kos:

(1) Adalah jelas dari surat arahan dan surat tawaran bahawa defendan kedua tidak terlibat dalam proses keputusan plaintif tersebut dibuat untuk memberikan kemudahan pinjaman tersebut kepada STT. Defendan kedua juga tidak terlibat dalam menentukan kelayakan kredit STT dan pengarah atau penjaminnya. Plaintif mempunyai proses dalaman sendiri untuk meneliti permohonan kemudahan pinjaman tersebut yang mana ianya diputuskan oleh plaintif sendiri. Dari surat arahan tersebut, adalah jelas bahawa tugas defendan kedua adalah terhad kepada penyediaan dokumen-dokumen pinjaman yang diperlukan (lihat perenggan 38).

(2) Defendan kedua tidak terlibat dalam penyediaan dokumen perjanjian jual beli ('PJB') dengan harga RM7 juta dan juga tidak menyedari PJB dengan harga RM432,000 untuk hartanah tersebut. PJB untuk hartanah antara STT (pembeli) dan Ding Kuai Bing @ Lim Kui Ming (penjual) dengan harga belian RM7 juta telah disediakan oleh peguam cara lain, bukannya defendan kedua. PJB dengan harga RM7 juta adalah

satu-satunya PJB yang diterima defendan kedua daripada plaintif dan defendan kedua tidak menyedari bahawa terdapat PJB lain dengan harga pembelian yang lebih rendah sebanyak RM432,000 (PJB kedua) untuk hartanah yang sama. Oleh kerana kedua-dua PJB tidak disediakan oleh defendan kedua, defendan kedua tidak mengetahui bahawa harga hartanah tersebut telah terlebih nilai. Peguam yang menyediakan PJB dan penilai yang menghargai harta (defendan pertama) yang mengetahui perkara tersebut, bukannya defendan kedua (lihat perenggan 39).

(3) Dalam rayuan ini, PJB telah ditandatangani sebelum plaintif meluluskan kemudahan pinjaman tersebut sebanyak RM5.9 juta kepada STT. Oleh yang demikian, defendan kedua boleh menganggap bahawa PJB yang telah dimeterai dengan vendor telah disahkan oleh plaintif. Tiada kewajipan terhadap defendan kedua untuk memastikan PJB bebas daripada masalah undang-undang. Kewajipan tersebut terletak pada plaintif. Oleh itu, HMT terkhilaf dari dalam undang-undang untuk meneliti bahawa tidak ada kewajipan di pihak defendan kedua untuk meneliti proses penilaian harta tersebut atau keesahan PJB memandangkan terdapat fakta bahawa PJB tidak pernah disediakan oleh defendan kedua dan bahawa tugas defendan kedua atau ejen mereka hanya terhad kepada penyediaan dokumen-dokumen pinjaman tersebut (lihat perenggan 41).

(4) Plaintif memplidkan bahawa terdapat bukti penipuan dan/atau konspirasi/pelanggaran tugas antara defendan kedua dan/atau defendan pertama dan/atau pengarah STT/STT dan/atau vendor. Walau bagaimanapun, tiada butir-butir penipuan atau konspirasi telah diplidkan antara defendan kedua dan/atau defendan pertama atau pengarah atau vendor STT /STT atau mana-mana pihak ketiga yang lain. Perkara ini membuatkan tuntutan untuk penipuan dan/atau pelanggaran/konspirasi terhadap defendan kedua tidak dapat dipertahankan (lihat perenggan 44).

(5) Hakim Mahkamah Tinggi telah terkhilaf dalam meneliti bahawa isu penukaran forum prosiding dalam memulakan tuntutannya terhadap defendan kedua. Sebelum pemfailan tuntutan terhadap defendan pertama dan kedua, plaintif telah memulakan prosiding di Mahkamah Tinggi ('tindakan perlaksanaan') terhadap STT dan penjamin-penjaminnya dan di dalam tuntutan itu, plaintif telah menganggap kemudahan pinjaman sebagai biasa dan sah dan tiada dakwaan pelanggaran dilakukan bahawa STT, melalui pengarah-pengarahnya, telah bersubahat atau bersekongkol dengan defendan pertama dan kedua supaya untuk mencapai keuntungan yang salah daripada plaintif seperti yang diplidkan oleh plaintif di dalam kes rayuan ini (lihat perenggan 45).

(6) Tindakan perlaksanaan telah difailkan semata-mata di atas

keberhutangan STT. Plaintif boleh memplidkan konspirasi atau pelanggaran tugas oleh STT, pengarah STT, penjamin, penilai dan defendan kedua sejak awal lagi, namun plaintif telah gagal berbuat demikian. Sebaliknya, plaintif telah memilih untuk menganggap kemudahan pinjaman sebagai sah dan teratur. Plaintif telah memperoleh penghakiman ingkar dengan faedah dan kos. Plaintif kemudiannya telah memulakan prosiding pelaksanaan dan memulakan prosiding kebankrapan terhadap pengarah STT. Oleh disebabkan plaintif masih gagal mendapatkan semula kerugiannya, plaintif memfailkan tindakan ini di bawah rayuan terhadap defendan pertama dan kedua, mengubah pendiriannya dan mengambil kedudukan undang-undang yang berbeza daripada tindakan sebelumnya bahawa kausa tindakan tuntutan adalah berdasarkan kecuaian, penipuan, konspirasi dan pelanggaran tugas terhadap defendan pertama dan kedua. Plaintif adalah diestop untuk mengubah kedudukannya di peringkat rayuan ini (lihat perenggan 46).

(7) Keputusan untuk memberhentikan Cik Saraswati dibuat kira-kira setahun sebelum tuntutan rayuan ini difailkan. Pemecatan beliau yang dibuat atas dasar kecuaian, pemulihan/tindakan hutang terhadap STT, pengarah dan penjamin STT dan tindakan semasa terhadap defendan pertama dan kedua di bawah rayuan menunjukkan kedudukan bercanggah oleh plaintif. Pembehentian tersebut juga jelas menunjukkan pengakuan atau pengakuan plaintif bahawa pekerjanya sendiri adalah cuai dalam memberikan kemudahan pinjaman kepada STT. Tiada perkara yang diplidkan bahawa plaintif adalah mangsa penipuan yang melibatkan STT, pengarah, vendor dan defendan pertama dan kedua (lihat perenggan 52).

(8) Tindakan plaintif dalam mengubah pendiriannya adalah berdasarkan keberhutangan STT; maka perkara asas pemberhentian Cik Saraswati termasuk tindak balasnya terhadap prosiding pemecatan yang dimulakan oleh Cik Saraswati di dalam prosiding Mahkamah Perusahaan adalah berdasarkan pengakuan cuai oleh Cik Saraswati dan tindakan rayuan terhadap defendan pertama dan kedua yang berdasarkan pelanggaran tugas oleh defendan kedua dengan salah menasihati plaintif untuk melepaskan kemudahan pinjaman kepada STT. Ianya dibuat tanpa pengesahan atau penyiasatan yang betul ke atas defendan-defendan pertama dan kedua yang berdasarkan pelanggaran defendan kedua dengan salah menasihati plaintif untuk melepaskan kemudahan perbankan kepada STT tanpa penelitian yang betul terhadap defendan-defendan kedua dengan salah menasihati plaintif untuk melepaskan kemudahan pinjaman kepada STT tanpa penyiasatan yang betul ke atas defendan-defendan pertama dan kedua yang berdasarkan pelanggaran tugas defendan kedua terhadap plaintif untuk melepaskan kemudahan pinjaman kepada STT. Dakwaan bahawa kontrak, penipuan, pelanggaran atau konspirasi yang dilakukan oleh defendan

pertama dan kedua dengan STT sebagai pembeli hartanah dan peminjam kemudahan perbankan dan vendor: semua ini mendedahkan bahawa tuntutan plaintif di bawah rayuan adalah meremehkan, menyusahkan dan/atau sia-sia dan sebenarnya merupakan percubaan plaintif untuk menukar isu dalam tuntutan. Oleh yang demikian, disebabkan pendirian yang berbeza oleh plaintif, tindakan tuntutan ini seharusnya dibatalkan (lihat perenggan 53).

(9) Tuntutan plaintif juga merupakan satu penyalahgunaan proses mahkamah. Tuntutan plaintif adalah percubaan oleh plaintif untuk mengukuhkan kedudukannya berhubung dengan wang yang perlu dibayar dan terhutang di bawah kemudahan pinjaman tersebut. Hal ini kerana dalam tindakan perlaksanaan tersebut, plaintif telah berusaha untuk mendapatkan semula RM15,776,694.08 dengan faedah terhadap STT sebagai wang yang perlu dibayar dan terhutang di bawah kemudahan pinjaman tersebut ('jumlah penghakiman'). Plaintif juga gagal mendapatkan semula jumlah penghakiman tersebut dan telah memulakan prosiding pelaksanaan terhadap STT dan pengarah untuk tindakan yang sama. Plaintif kemudiannya memohon untuk mendapatkan semula daripada defendan kedua untuk jumlah tunggakan daripada jumlah penghakiman yang perlu dibayar dan terhutang oleh STT, yang berjumlah RM5,784,473.12 walaupun plaintif sendiri mengakui melalui Cik Saraswati, bahawa kerugian yang dialami oleh mereka adalah disebabkan oleh kecuaian pekerja mereka sendiri dalam meluluskan kemudahan pinjaman tersebut kepada STT tanpa merujuk kepada SPA yang dilaksanakan oleh STT sebagai pembeli dan vendor. Plaintif juga tidak meneliti laporan penilaian yang dibuat oleh defendan pertama. Plaintif mempunyai pengetahuan bahawa harta tersebut telah dibayar oleh STT dan didaftarkan atas nama STT sebelum diluluskan oleh mereka wang untuk kemudahan pinjaman tersebut. Semua ini menunjukkan bahawa tuntutan plaintif adalah percubaan untuk menukar isu tuntutan secara taktikal. Oleh itu, perkara ini merupakan penyalahgunaan proses mahkamah (lihat perenggan 55).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and Another Appeal [1995] 2 MLJ 770, CA (refd)

Associated Leisure Ltd (Phonographic Equipment Ltd) & Ors v Associated Newspapers Ltd [1970] 2 QB 450, CA (refd)

Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals [2014] 1 MLJcon 134; [2011] 7 CLJ 909, FC (refd)

Chung Khiaw Bank Ltd v Tio Chee Hing [1987] 2 MLJ 701, SC (refd)

Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor [1988] 3 MLJ 348; [1988] 1 CLJ Rep 606, HC (refd)

Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu (formerly known as Dai-Ichi

Shokai) & Ors [2017] 5 MLJ 63, CA (refd)
Re Vernazza [1959] 2 All ER 200, QBD (refd)
Wong Yew Kwan v Wong Yu Ke & Anor [2009] 2 MLJ 672; [2010] 2 CLJ 703, CA (refd)
Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd & Ors [2013] 2 MLJ 915, CA (refd)
Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors [2014] 2 MLJ 799, FC (refd)

Legislation referred to

Rules of Court 2012 O 18 r 19(1), (1)(b), (1)(c), (1)(d)

Appeal from: Civil Suit No JB-22NCVC-53–08 of 2017 (High Court, Muar)

Malik Imtiaz Sarwar (Chan Wei June and Phang Ja Mein with him) (Yeo Chambers) for the appellant.
Christopher Arun a/l Francis (Daniel Husseini bin Mohd Ghazali Forsberg with him) (Ariff Rozhan & Co) for the respondent.

Suraya Othman JCA (delivering judgment of the court):

INTRODUCTION

[1] The appellant/second defendant (Sykt Rodziah) sued as a firm, filed an application for striking out of the respondent/plaintiff's Malayan Banking Bhd) claim ('encl 15') on the basis that premised on the documentary evidence before the court, it is apparent that the plaintiff's claim is scandalous, frivolous and vexatious and/or an abuse of process pursuant to O 18 r 19(1)(b), (1)(c) and/or (1)(d) of the Rules of Court 2012 ('the ROC 2012'). Further, the appellant/second defendant contend that the plaintiff's claim against the second defendant is untenable and is an attempt to forum shop and issue switch.

[2] The High Court on 3 June 2018 dismissed encl 15, holding that the plaintiff's claim was not 'obviously unsustainable'. The High Court is of the view that since parties are in the process of filing the documents in preparation for trial, including the relevant issues to be tried, and that since the claim by the respondent/plaintiff involves the allegation of negligence and fraud on the part of the appellant/second defendant, that this justifies that the claim should go for trial.

[3] We heard the appeal and having considered the appeal records and submission of parties, we unanimously allowed the appeal with costs. We now give our reasons for doing so. For ease of reference, parties will be referred to as

they were in the High Court, the appellant as the second defendant and the respondent as the plaintiff.

BACKGROUND FACTS

[4] The plaintiff (Malayan Banking Bhd) is a licensed financial institution under the Financial Services Act 2013. It has its registered address at 14th Floor, Menara Maybank, 100, Jalan Tun Perak, 50050 Kuala Lumpur. The plaintiff has a Business Centre at the 2nd Floor Bangunan Maybank, 84, Jalan Rahmat, 83000 Batu Pahat, Johor. The plaintiff brought a claim against the first and the second defendant.

[5] The first defendant (Bahari and Co) is a partnership carrying out a practice of valuation and estate agency and is registered with the Board of Valuers, Appraisers and Estate Agents Malaysia. Its registration number is VE (2) 0255 and its business address is at Suite 1202, 12th Floor, Johor Tower, No 15, Jalan Gereja, 80100 Johor Bahru, Johor.

[6] The second defendant (Sykt Rodziah sued as a firm), the appellant in this appeal, is a firm of solicitors having its branch address at No 30, Tingkat 1, Jalan Datuk Kapten Ahmad, 86000 Kluang, Johor. The second defendant was on the plaintiff's panel of lawyers.

[7] The plaintiff offers, inter alia, financing for the purchase of property including industrial buildings.

[8] The borrower, Sentosa Timber Trading Sdn Bhd ('STT') approached the plaintiff to obtain financing for, inter alia, the purchase of two units of 1 1/2 storey detached industrial buildings at Taman Industri Sri Sulong and working capital ('properties').

[9] The plaintiff through Ms Saraswati Periasamy ('Ms Saraswati') by a letter dated 26 March 2015 (the 'letter of offer') approved and granted banking facilities to STT for the total sum of RM5.9m (the 'banking facilities') to 'part finance the purchase of two units of 1 1/2 storey detached factory building in Sri Sulong Industrial Area' ('the properties'). The relevant particulars of the banking facilities granted by the plaintiff to STT in relation to the properties are set out in Table A below:

Table A

No	Description	Date of Approval of Banking Facilities by the Plaintiff	Banking Facilities	Amount (RM)
1.	2 units of 1 1/2 storey detached industrial building at: (a) No 9 Jalan Sri Sulong 23/A Taman Perindustrian Sri Sulong, 83000 Batu Pahat Johor (Lot 13588) (b) No 11 Jalan Sri Sulong 23/A Taman Perindustrian Sri Sulong, 83000 Batu Pahat Johor (Lot 13589)	March 2015	Term Loan	4,900,000.00
			Letter of Credit/Trust Receipt/ Bankers Acceptance/ Guarantees	1,000,000.00
			TOTAL	5,900,000.00

[10] STT offered to the plaintiff, inter alia, the properties as security for the banking facilities. Additional security was given in the form of, inter alia, personal guarantees from Lim Chee Seng and Seah Boon Kiong. In this regard, Lim Chee Seng and Seah Boon Kiong, at all material times, were the directors and shareholders of STT ('borrower's directors').

[11] The plaintiff, in relation to the banking facilities, instructed the first defendant to carry out the valuation of the properties. Pursuant to the plaintiff's instructions, the first defendant provided the plaintiff with two valuation reports of the properties ('valuation reports').

[12] The valuation reports were specifically prepared by the first defendant for the purpose of securing banking facilities and/or financing and/or mortgage that were applied for by STT. The value of the properties based on the valuation reports are set out in Table B below:

Table B

No	Description	Date of Valuation	Valuation (RM)
1.	No. 9 Jalan Sri Sulong 23/A Taman Perindustrian Sri Sulong, 83000 Batu Pahat Johor (Lot 13588)	12.4.2015	3,500,000.00
2.	No. 11 Jalan Sri Sulong 23/A Taman Perindustrian Sri Sulong, 83000 Batu Pahat Johor (Lot 13589)	14.4.2015	3,500,000.00

[13] The plaintiff contended that based upon and relying on the representation and/or valuations of the properties provided by the first defendant, the plaintiff approved the banking facilities to the borrower on 26 March 2015.

[14] By a letter dated 2 April 2015 ('the letter of instruction'), the plaintiff through Ms Sarawasti notified the second defendant that STT 'had been granted Banking Facility' and instructed the second defendant to prepare the necessary documents related to the banking facilities. The second defendant then prepared the loan documentations in relation to the banking facilities such as the facility agreements as per the plaintiff's instruction.

[15] By a letter dated 20 April 2015, the second defendant advised the plaintiff that it could release the banking facilities *to STT if it was satisfied that STT had fulfilled all the necessary condition precedents*. The plaintiff proceeded with the same.

[16] STT defaulted in payment of the loan and the plaintiff filed a suit on 11 January 2016 for the recovery of the loan/debt from STT and its directors/guarantors 'recovery/debt action'). *The plaintiff was not able to recover the debt from STT and the directors.*

[17] The plaintiff then filed a suit against the first and second defendants on 1 August 2017 for breach of contract, negligence, fraud and conspiracy.

[18] The plaintiff alleged that the valuations of the properties were negligently and erroneously prepared by the first defendant in that the first defendant had grossly, deliberately and unreasonably inflated the market value of the properties without any basis with intention to deceive and mislead the plaintiff and consequently the first defendant had committed fraud.

[19] The plaintiff alleged that the second defendant, in its capacity as

solicitors of the plaintiff, had, inter alia, in breach of its retainer, wrongfully and recklessly advised the plaintiff to release the banking facilities to STT through the second defendant's letter dated 20 April 2015 *without any proper verification in that the second defendant did not investigate and/or made inquiries and/or searches on the properties*. Consequently, the plaintiff further alleged that the first and second defendant had conspired to commit fraud on the plaintiff for the benefit and financial gain for themselves, STT, the directors and the vendor.

[20] The second defendant then filed an application to strike out the plaintiff's claim (encl 15) on 21 March 2018 which application was dismissed by the High Court on 3 June 2018, and hence this appeal.

DECISION OF THE HIGH COURT

[21] The High Court judge ('learned judge') dismissed encl 15 and found that there were triable issues that merit determination in a full trial. In gist, the learned judge found that:

(a) an application to strike out a claim under O 18 r 19(1) of the ROC 2012 may be made at any stage of the proceedings, even after the close of pleadings. *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672; [2010] 2 CLJ 703 was referred to where the court can strike out a claim even though the application was made 14 months after the close of pleadings; and

(b) however, the learned judge was ultimately of the view that the plaintiff's claim was not 'obviously unsustainable', as parties had already filed documents in preparation for trial, including the relevant issues to be tried which in itself showed that witnesses would need to be called since the case against the second defendant involves the issues of fraud or negligence on the part of the second defendant.

THE APPEAL

Second defendant's submission

Decision to grant banking facilities to STT was by the plaintiff

[22] The second defendant submitted that it was not involved in the plaintiff's decision making process to grant the banking facilities to STT. The second defendant was only instructed by a letter dated 2 April 2015 (letter of instruction) to prepare the necessary documents for the banking facilities after the plaintiff had approved and granted the banking facilities to STT.

Creditworthiness of STT determined by plaintiff

[23] The second defendant contended that it was not involved in determining the creditworthiness of STT and its directors or guarantors. The plaintiff had its own internal processes to scrutinise the application for the banking facilities and the granting of the same was ultimately decided by the plaintiff.

No duty imposed on the second defendant to enquire into the valuation of the properties or legality of SPA. Duty only limited to the preparation of the banking facilities/security documentation

[24] The second defendant further contended that the learned judge had erred in law and/or in fact in failing to appreciate that there was no duty imposed on the part of the second defendant to enquire into the valuation of the properties or the legality of the sales and purchase agreement ('SPA') and that its retainer was limited to the preparation of banking facilities/security documentation. This is so since the second defendant was not involved in the valuation of the properties nor involved in the preparation of the SPA. The SPA for RM7m was the only SPA which the second defendant had received from the plaintiff and it was not aware of the existence of another SPA for a lesser purchase price of RM432,000 for the same properties.

Properties had already been transferred and registered in STT's name before the second defendant had advised for the monies for the banking facilities to be released to STT

[25] Prior to the release of the monies for the banking facilities to STT, the second defendant had notified the plaintiff that the properties had already been transferred and registered in STT's name.

Particulars of conspiracy not pleaded

[26] The plaintiff pleaded that there was evidence of conspiracy/collusion between the second defendant and/or the first defendant and/or STT/STT's directors and/or the vendors from the time the banking facilities were approved. However, no particulars of conspiracy were pleaded between the second defendant and/or the first defendant and/or STT directors and/or vendor and/or any other third parties.

Plaintiff was issue switching and forum shopping/Plaintiff's contradictory stance

[27] The learned judge had erred in law and/or in fact in failing to appreciate that the plaintiff was in fact issue switching and forum shopping in initiating its

claim against the second defendant. This is so since prior to filing the claim against the second defendant, the plaintiff had commenced proceedings in Kuala Lumpur High Court Civil Action No WA-22NCC-13–01 of 2016 ('recover/debt action') against STT and its guarantors and in that claim, the plaintiff had treated the banking facilities as regular and valid and no assertions of collusion or conspiracy were made that STT, through its directors, had colluded or conspired with the second defendant in order that it could achieve a wrongful gain from the plaintiff in the manner now asserted by the plaintiff in this claim against the second defendant under appeal.

INDUSTRIAL COURT PROCEEDINGS

[28] Further, in the Industrial Court proceedings for wrongful dismissal initiated by Ms Saraswati, the plaintiff's stance was that its employee Ms Saraswati was negligent. The plaintiff had dismissed Ms Saraswati, the Head of the Batu Pahat Business Centre who approved the banking facilities to STT. Her deputy, Mr Koh Sze Buan was also dismissed. The decision to dismiss Ms Saraswati was made approximately over a year before the claim pertaining to this appeal was filed. Her dismissal which was made on the basis of negligence, the recovery/debt action against STT and guarantors and the present action against the first and second defendant under appeal showed the contradictory positions taken by the plaintiff.

THE PLAINTIFF'S SUBMISSION

Delay and filing the striking out application after close of pleadings

[29] The plaintiff contended that the application to strike out was not made promptly since it was made 141 days after the close of pleadings. This showed that parties had every intention to set the matter down for trial.

Application not made in good faith

[30] The plaintiff submitted that the second defendant's striking out application was not made in good faith and that it was a tactical manoeuvre which was contrived by the second defendant.

Pre-trial case management already conducted

[31] The legal basis in support of such an application is flawed in light of the second defendant's conduct and the manner in which it has conducted pre-trial case management.

Cause of action separate and distinct/Issue switching and forum shopping

[32] The cause of action in the recovery/debt action against STT and guarantors is separate, distinct and fundamentally different from the present action against the FIRst and the second defendant. The judgment in default ('JID') obtained against STT in the recovery/debt action does not disentitle the plaintiff from commencing the present action against the first and the second defendant as the JID did not address the claim for breach of contract, negligence, fraud and conspiracy in the present action.

Issue switching and forum shopping

[33] The second defendant's allegations that the plaintiff is issue switching and forum shopping in an attempt to salvage its position vis a vis the banking facilities by implicating the second defendant cannot be true as prior to the dismissal of Ms Saraswati on 15 June 2016, the plaintiff had lodged a complaint with the Advocates & Solicitors Disciplinary Board against the Managing Partner of the second defendant on 21 April 2016. In any event, the plaintiff's knowledge and/or negligence, if any, which is denied, does not absolve the second defendant from its professional and/or contractual duties and obligations to the plaintiff as its solicitors.

Triable issues

[34] This is not a plain and obvious case for striking out as the plaintiff's claim against the second defendant is not obviously unsustainable. There are issues which have to be adjudicated through oral evidence before this matter can be determined. To do so summarily will amount to a miscarriage of justice in light of the various allegations of negligence, breach of retainer and conspiracy made against the second defendant.

OUR DECISION AND DELIBERATION

[35] The claim against the second defendant, a legal firm which was on the plaintiff's panel of lawyers, is for negligence, breach of contract, fraud and conspiracy in relation to banking facilities that was granted by the plaintiff to the borrower STT. The crux of the plaintiff's claim against the second defendant is that the second defendant knew that the properties which the banking facilities were obtained for as working capital, were overvalued, but proceeded to dishonestly and/or recklessly advised the plaintiff to release the banking facilities to STT without adequate security, thus resulting in the plaintiff incurring losses. The allegation that the second defendant had knowledge that the properties were overvalued was due to the fact that there were two valuation reports on the same properties: one for RM7m and the other for RM432,000.

Decision to grant banking facilities to STT was by the plaintiff creditworthiness of STT determined by plaintiff

No duty imposed on second defendant to enquire into the valuation of properties or legality of SPA. Duty only limited to the preparation of banking facilities/security documentation

Properties had already been transferred and registered in STT's name before the second defendant had advised for the monies for the banking facilities to be released to STT

[36] In this case the plaintiff had by a letter dated 26 March 2015 ('the letter of offer) approved and granted banking facilities to STT for the total sum of RM5.9m to 'part finance the purchase of two units of 1 1/2 storey detached factory building in Sri Sulong Industrial Area'. STT, in lieu, offered the properties, among others, as security for the banking facilities. The letter of offer from the plaintiff to the borrower SST dated 26 March 2015 read as follows:

(the remainder of the page is left intentionally blank)

Our Ref BPBB/PS/AK/NN/16/01468/2015.IX 1045
Date 26/03/2015

THE MANAGING DIRECTOR
SENTOSA TIMBER TRADING SDN BHD
LOT 14983, JALAN INDUSTRI 84
KAWASAN PERINDUSTRIAN GRISEK
84700 LEDANG, JOHOR

Dear Sir/Madam,

Re: BANKING FACILITIES
Business Centre: Batu Pahat

We are pleased to inform that our Management had approved your additional banking facilities under MAXIPLAN Option III as follows:

1. Additional Term Loan (2) of RM4,900,000-00
2. Additional Tradelines of RM1,000,000-00 making a total of Rm4,000,000-00

Subject to the following terms & conditions:

Facility(s)	Existing Limit	Additional	Total Limit
Term Loan 1 (TL1)	RM4,833,746-28*	-	RM4,833,746-28*
Term Loan 2 (TL2)	-	RM4,900,000-00	RM4,900,000-00
Overdraft (OD)	RM1,900,000-00	-	RM1,900,000-00
Trust Receipt (T R) (120 days)	RM3,000,000-00	RM1,000,000-00	RM4,000,000-00
Banker's Acceptance (BA) (Purchase-Fin) (120 days)			
Banking Guarantee (BG) (Fin) (Blanket)			
Total	RM9,733,746-28	RM5,900,000-00	RM15,633,746.28

The limit of each of the above facility(s) may be interchangeable at the discretion of the Bank, provided always that the total amount of the facility (s) utilised at anytime shall not exceed RM1,000,000-00 (Excluding TL)

*Note : Outstanding as at 26/03/2015

Kindly signify your agreement and acceptance of the terms and conditions of the facility(s) by signing the enclosed copy of the letter in accordance with your Board of Director's Resolution (a certified true copy of which is to be given to the Bank) and returning the same to the Bank within fourteen (14) days from the date this letter, failing which this offer will lapse.

Upon receipt of your acceptance of the Bank's offer we shall advice the Bank's solicitors to prepare the necessary steps to perfect the Bank's security. The obligation of the Bank to make available the facility(s) shall be subject to the execution of such documentation and the steps as advised by the Bank's solicitors having been taken.

We look forward to your acceptance of the offer.

Yours faithfully
for and on behalf of **Maybank**
Business Banking
Batu Pahat Business Centre

SARASWATI PERIASAMY
Head

AAINAL KAMALIA MUHAMAD SAID
Relationship Manager

[37] On 2 April 2015 ('the letter of instruction'), the plaintiff notified the second defendant that STT 'had been granted banking facility' and instructed the second defendant to prepare the necessary documents related to the banking facilities and send all the documents to its Johore Bahru Credit Administration Centre ('CAC') for further action once the documents were duly stamped. The letter of instruction from the plaintiff to the second defendant dated 2 April 2015 read as follows:

Our Ref : BPBB/PS/AK/NN/15/1004
Date : 2 April 2015

M/s Syarikat Rodziah
Advocate & Solicitor
No. 30, 1st Floor
Jalan Dato' Captain Ahmad
86000 Kluang, Johor

Dear Sir,

RE : Customer : M/s Sentosa timur Trading Sdn Bhd
Facility/Limit : Term Loan (2) of RM4,900,000-00 & TR/BA/BG of RM1,000,000-00
AA No. : 014682015JX1045

The above customer had been granted banking facility against Property and Joint and Several Guarantee. Kindly attend to the followings:

i) Original Letter of Offer dated 26/03/2013 for the stamping proposes.
ii) The necessary documents related with this facility.

Enclosed herewith the following documents for your perusal:

i) Copy of Title (GM8315 & 8316, Lot 13588 -13589)

For any enquiry, kindly liaise with Mr Seah Boon Kong at phone no. 019-7452228/06-9127011.

Kindly send all the documents duly stamping and completed to our CAC, JB for their further action.

Meanwhile, kindly acknowledge receipt by signing and returning to us the duplicate of this letter.

Yours faithfully,
for ***Maybank***
Business Banking
Batu Pahat Business Centre

SARASWATI PERIASAMY
Head

AAINAL KAMALIA MUHAMAD SAID
Relationship Manager

c.c Maybank
Credit Administration Centre
Business Documentation & Disbursement
Aras Maybank, Menara J.A. Venture
No. 1 Jalan Kempas 3/1, Kempas Baru
81200 Johor Bahru, Johor

[38] It is clear from the two letters above that the second defendant was not involved in the plaintiff's decision-making process to grant the banking facilities to STT. The second defendant was not involved in determining the creditworthiness of STT and its directors or guarantors. The plaintiff had its own internal processes to scrutinise the application for the banking facilities and the granting of the same was ultimately decided by the plaintiff. From the letter of instruction dated 2 April 2015 it is apparent that the second defendant's duty was limited to the preparation of the necessary loan documentation: that is to prepare the necessary documents for the banking facilities, have them duly stamped and then sent the documents to the Johore Bahru CAC for further action. This can be discerned from the fact that the instruction to the second defendant was given on 2 April 2015 after the plaintiff had approved and granted the banking facilities to STT on 26 March 2015.

[39] It is undisputed that the second defendant was not involved in the preparation of the sale and purchase agreement (SPA) for RM7m nor was it aware of the SPA for RM432,000 for the same Properties. The SPA for the properties between STT (the purchaser) and one Ding Kuai Bing @ Lim Kui Ming (the vendor) for the purchase price of RM7m was prepared by another solicitor and not by the second defendant. The SPA for RM7m was the only SPA the second defendant had received from the plaintiff and the second defendant was not aware that there was another SPA for a lesser purchase price of RM432,000 (the second SPA) for the same properties. Since both the SPAs were not prepared by the second defendant, how could the second defendant had known that the price of the properties was overvalued. That knowledge should be imputed to the solicitor who prepared the SPAs and the valuer who valued the properties (the first defendant) and not the second defendant.

[40] In the Federal Court decision of *Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals* [2014] 1 MLJcon 134; [2011] 7 CLJ 909, the appeal had arisen from the decision of the Court of Appeal. In affirming the High Court decision to strike out the appellants action against the respondent, which was the financing bank, the appellants alleged in essence that the SPA entered into between the appellants and the developer was void in law for having contravened the law, and consequently, the financing agreements which the appellants had signed with the financial institutions was void and of no effect. In dismissing the appeal, Zulkefli Makinudin FCJ, held:

> [12] We shall first deal with the third question framed in this appeal as this deals with the duty of any of the respondents to enquire. *The appellants take the view that there is a duty on the part of the respondent to enquire into the legality of the SPA. It is our considered view this is not a tenable proposition for the following reasons.*
>
> [13] *The respondent is not a party to the SPA. The SPA is the respective appellant's contract with the developer. Therefore, the duty is cast on the appellants rather than the respondent to ensure that the SPA is free from any legal infirmity. If they have omitted to do so, we are of the view they cannot rely on their default to defeat the respondent's claim to repay their loans*. On this point we would cite the case of *Golden Vale Gold Range & Country Club Sdn Bhd v Hong Huat Enterprise Sdn Bhd (Airport Auto Centre Sdn Bhd & Anor, third party and another appeal)* [2008] 4 MLJ 839; [2008] 6 CLJ 31 wherein Gopal Sri Ram, JCA (as he then was) at p 39 had this to say:
>
> > If this clause is to be given effect to, it would mean that Airport Auto could rely on its own failure to complete the sale and thereby defeat the defendant's claim for specific relief. It would mean that Airport Auto could rely on its own wrong to its advantage. Settled authority has held that a party cannot rely on its own wrong to defeat its opponent's claim.
>
> [14] It is also our considered view that the respondent has no duty to advise the appellants as borrowers in the present case because it is merely a financing bank and not an advisory bank. Generally speaking, in a commercial loan a lender is entitled to seek and obtain the best terms it can. It may have regard solely to its own

commercial interest. It is not the lender's obligation to ensure that the borrower has made a correct or wise commercial decision based upon a full understanding of all risks unless the borrower has specifically sought the lender's advice. (See the case of *Redmand v Allied Irish Bank Plc* [1987] FLR 307).

[15] *It is to be noted the SPA has already been executed before the end financing facilities were granted. Therefore the respondent can presume that the SPA which the appellants had entered into has been ascertained by the appellants to be valid. It would be too onerous to require the respondent to investigate or enquire into a transaction or contract to which they are not a party. Banking business will be rendered impracticable and burdensome if this was so*. In this regard the courts should not impose such a requirement that may impede the flow of commerce ... (Emphasis added.)

[41] In our appeal the SPA had been executed before the plaintiff had approved the banking facilities for RM5.9m to STT. In the circumstances, the second defendant can presume that the SPA which STT had entered into with the vendor has been ascertained by the plaintiff to be valid. There is no duty cast on the second defendant to ensure that the SPA is free from any legal infirmity. The duty rest on the plaintiff. Therefore, the learned judge had erred in law and/or in fact in failing to appreciate that there was no duty on the part of the second defendant to investigate or enquire into the valuation of the properties or the legality of the SPAs given the fact that the SPAs were never prepared by the second defendant and that the second defendant's duty or their retainer was limited only to the preparation of the banking facilities/security documentation.

[42] Further, the second defendant had on three occasions notified the plaintiff that the SPA for RM7m was already executed way before the letter of offer from the plaintiff to STT dated 26 March 2015 was issued; that the properties were already registered in STT's name and that the directors of STT had already paid the full purchase price for the properties prior to the advice given by the second defendant to release the monies for the banking facilities. In the letter of instruction of the second defendant to the plaintiff dated 20 April 2015, the second defendant had stated clearly that the registered owner of the properties is STT and further stated that the plaintiff should ensure that all the conditions precedent were met before releasing the monies. The letter stated that the monies should be released 'Provided that you are satisfied that all conditions precedent stated in the facility agreement, the Legal Charge, the Letter of Guarantee, the General Letter of Indemnity for Banker's Guarantee, the Letter of Undertaking With Respect to Bankers Acceptances, the Memorandum of Deposit, the Letter of Set-Off, the Letter of Offer and/or Supplementary Letter of Offer have either been fulfilled by the Borrower(s) or waived by you, we would advise that your Bank may now release the Term Loan 2 (TL2) to be reimburse to the Borrower on the purchase of the properties to the extent on RM4,900,000 to the Borrower and utilized Tradelines'. The letter from the second defendant to the plaintiff dated 20 April 2015 read as follows:

A

Your Ref : **CAC/JOH/BDC S/ASL/Wimna/B.Pasir/TL**
Our Ref : S RK/LG/6768/15/NA/fh
Date : 20/4/2015

The Manager
MALAYAN BANKING BERHAD
Credit Administration Centre, Johor/Melaka
Level-2, Aras Maybank, Menara JA Venture
No. 1, Jalan Kempas 3/1, Kempas Baru
81200 Johor Bahru, Johor

B

Dear Sir,

RE : ADVISE RELEASE OF FACILITIES
Branch : **Taman Bukit Pasir**
Facilities : **Term Loan 2 (TL 2) of RM4,900,000.00 & Tradelines (TR/BA & BG) of RM1,000,000.00**
Property : **GM 6315 – 6316 Lot 14388 – 13389 both of in the Mukim of Simpang Kiri, District of Batu Pahat, State of Johor**
Borrower(s) : **M / s Sentosa Timber Trading Sdn Bhd**
Chargor(s) : **M / s Sentosa Timber Trading Sdn Bhd**
Vendor(s) : **Dim Kual Bieg @ Lim Kui Ming**

C

D

1) We refer the above matter and hereby confirm as follows: -

(a) that the Instrument of Transfer in favour of the Purchaser's has been duly executed by the Vendor(s) of the Purchaser(s) is adjudicated, stamped and is in order;
(b) that the Facility Agreement in favour of your Bank has been duly executed by the abovenamed Borrower and your Bank is stamped and is in order;
(c) that the 1st & 2nd Legal Charges in favour of your Bank has been duly executed by the abovenamed Chargor(s) and your Bank is stamped and is in order;
(d) that the Debenture in favour of your Bank has been duly executed by the abovenamed Borrower and your Bank is stamped and is in order;
(e) that we have filed the said Debenture at the High Court at Muar of **21/04/2015** vide Registration No: **825-04/2015 dated 21/04/2015 & 826-04/2015 dated 21/04/2015**;
(f) that the Letter of Guarantee in favour of your Bank has been duly executed by the Director(s) of the Borrowing Company is stamped and is in order;
(g) that the General Letter of Indemnity of Banker's Guarantee and Letter of Undertaking With Respect to Bankers Acceptances in favour of your Bank has been duly executed buy the Directors of the Borrowing Company the same are in order and stamped;

E

F

...

5) Provided that you are satisfied that all conditions precedent stated in the Facility Agreement, the Legal Charge, the Letter of Guarantee, the General Letter of Indemnity for Banker's Guarantee, the Letter of Undertaking With Respect to Bankers Acceptances, the Memorandum of Deposit, the Letter of Set-OFF the Letter of Offer and/or Supplementary of Letter Offer have either been fulfilled by the Borrower(s) or waived by you, we would advise that your Bank may not release the Term Loan 2 (TL2), to be reimburse to the **Borrower on the purchase of the properties to the extent of RM4,900,000-00 to the Borrower and utilized Tradelines.**

G

6) We hereby undertake to keep your indemnified against the abovesaid facility granted to the Borrower(s) if the above Charge cannot be registered due to any error on our part and further undertake to forward to you the duly registered Original Title Deed and the Duplicate Charge upon receipt from the Land Registry at Batu Pahat.

Please acknowledge receipt by signing and returning the duplicate copy of this letter to us.

Thank you.

Yours faithfully,
for ***and on behalf of Syarikat Rodzian***

c.c M / s Sentosa Timber Trading Sdn Bhd
Lot 14983, Jalan Industri BA4
Kawasan Perindustrian Grisek
84700 Ledang, Johor Darul Taksim

H

[43] If the plaintiff had failed or omitted to ascertain that the conditions precedent had been fulfilled by STT before releasing the monies in the banking facilities as advised by the second defendant, then the plaintiff has only itself to blame for the losses suffered by them.

I

Particulars of fraud and conspiracy not pleaded

[44] The plaintiff pleaded that there was evidence of fraud and/or conspiracy/collusion between the second defendant and/or the first defendant and/or STT/STT's directors and/or the vendors. However, no particulars of fraud or conspiracy were pleaded between the second defendant and/or the first defendant or STT/STT's directors or vendors or any other third parties. This makes the claim for fraud and/or collusion/conspiracy against the second defendant unsustainable. See the Federal Court case of *Zung Zang Wood Products Sdn Bhd & Ors v Kwan Chee Hang Sdn Bhd & Ors* [2014] 2 MLJ 799, where the Federal Court emphasised the importance of specific particulars where an allegation of fraud is pleaded. See also the case of *Associated Leisure Ltd (Phonographic Equipment Ltd) & Ors v Associated Newspapers Ltd* [1970] 2 QB 450 and *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and Another Appeal* [1995] 2 MLJ 770 where the Court of Appeal stated that in a case of fraud or conspiracy to defraud, the plea of fraud or conspiracy in a party's pleadings must be supported by full particulars.

Plaintiff was issue switching and forum shopping/plaintiff's contradictory stance taking a position in one court and the opposite in another/estoppel

[45] The learned judge had erred in law and/or in fact in failing to appreciate that the plaintiff was in fact issue switching and forum shopping in initiating its claim against the second defendant. This is so since from the outset and prior to filing the claim against the first and the second defendant, the plaintiff had commenced proceedings in Kuala Lumpur High Court Civil Action No WA-22NCC-13–01 of 2016 ('recovery/debt action') against STT and its guarantors and in that claim, the plaintiff had treated the banking facilities as regular and valid and no assertions of collusion were made that STT, through its directors, had colluded or conspired with the first and the second defendant in order that it could achieve a wrongful gain from the plaintiff in the manner now asserted by the plaintiff in this claim against the second defendants under appeal.

[46] Further, the recovery/debt action was filed on 11 January 2016, approximately one year and eight months before the filing of the claim to which this appeal pertains. The debt action was premised solely on STT's indebtedness. The plaintiff could have pleaded conspiracy or collusion by STT, STT's directors, guarantors, the valuers and the second defendant but the plaintiff had failed to do so. Instead, the plaintiff elected to treat the banking facilities as valid and regular. The plaintiff obtained a judgment in default of appearance for the sum of RM15,776,694.08 with interest and costs. The plaintiff then commenced execution proceedings and made STT's directors bankrupts. Unable to recoup its losses, the plaintiff filed this action under

appeal against the firt and second defendants, changing its stance and taking a different position or direction from its previous action that of a pure debt recovery based solely on indebtedness to one based on negligence, fraud, conspiracy and collusion against the first and second defendants. We are of the view and we agreed with the second defendant's counsel that once it is established that a party has adopted a particular stance in an action before the court, it is estopped from changing that stance in another action, and its admissions in pleadings would amount to judicial admissions admissible against it.

[47] In *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd & Ors* [2013] 2 MLJ 915, the Court of Appeal held that a party is estopped from taking a position different from that pleaded in its earlier suit and that the appellant in that case has no duty to advise on the alleged fraud which was clearly beyond their knowledge and scope of their retainer. The appellants thus could not be faulted for assuming the title was valid since the appellants was not a party to the SPA which was a contract between the vendor (USESB) and the purchaser (MISB). Therefore the duty is cast on the purchaser (MISB) rather than the appellants to ensure that the SPA was free from any legal infirmity.

[48] In *Zulpadli*, the appellants were sued as partners of a legal firm. The respondent instituted an action against the appellants for professional negligence, inter alia, for purportedly failing to obtain the approval of the estate land board and/or failing to exercise reasonable care and skill in regard to the same before presenting the memorandum of transfer and the charge form in respect of two properties to the land authority for registration, as a result of which, the said charge in the land in favour of the respondent was subsequently revoked and cancelled, thereby causing losses of RM19,700,000 to the respondent being the amount released to the vendors of the land. The court allowed the appellants' appeal against the decision of the High Court in dismissing the appellants' application to strike out the respondent's claim. In allowing the appellants' appeal, Ramly Ali JCA (as His Lordship then was), said at pp 921–923, as follows:

> [15] *The appellants could not be faulted for assuming the title was valid. The appellants are not party to the SPA. The SPA was a contract between the vendor (USESB) and the purchaser (MISB).* Therefore the duty is cast on the purchaser (MISB) rather than the appellants to ensure that the SPA was free from any legal infirmity (see Federal Court decision in *Chang Yun Tai & Ors v HSBC Bank (M) Bhd and other appeals* [2014] 1 MLJcon 134; [2011] 7 CLJ 909).
>
> ...
>
> [17] From the statement of claim, it can be summed up that the appellants were relying on the records of the SSM and the pendaftar hak milik (which had been defrauded by the third party). The appellants have no knowledge about the fraud. At the material times, all those records showed no legal infirmities' in the title.

Therefore, the appellants cannot be faulted for assuming the title was valid and for not giving proper advice on the fraud affecting the title of the said land when the fraud was discovered later.

[18] In the earlier suit filed by the original owners of USESB (the vendor of the said land), the respondent itself had taken the position that the registrar of titles was solely at fault and responsible for the loss suffered and that the respondent, through the appellants had adhered to all prudent banking practices in granting the loan facility and that all documentation was valid.

...

[20] The foregoing in law amounts to judicial admissions which had been made by the respondent. In this regard, we are in agreement with the decision in the case of *Hu Chang Pee v Tan Sri Datuk Paduka (Dr) Ting Pek Khiing* [1999] 3 MLJ 402 (subsequently affirmed by the Court of Appeal in *Tan Sri Datuk Paduka (Dr) Ting Pek Khiing v Hu Chang Pee (also known as Hii Chang Pee)* [2011] 6 MLJ 193; [2010] 1 LNS 1269) as follows:

> (2) The plaintiff in entitled to rely on the defendant's affidavit filed in Suit No 22–18–96 as the basis in the present suit. What was stated by the defendant in his affidavit dated 3 December 1996 was actually an admission by him. Admission in pleadings is judicial admission and can be made the foundation of rights. Admission are admissible against the party making them.

[21] Further in *YK Fung Securities Sdn Bhd v James Capel (Far East) Ltd* [1997] 2 MLJ 621; [1997] 4 CLJ 300, Mahadev Shanker JCA held as follows:

> For the record, however, we must state here that it is the opinion of this court that once a party to litigation has admitted a fact in his pleadings he shall not be heard to contend the contrary in the trial or in any appeal therefrom.

[22] The respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit show that the appellants were innocent victims as much as the respondent was. *The respondent is estopped from taking a position different from that pleaded in its defence in the earlier suit.* (Emphasis added.)

[49] The case of *Zulpadli* was referred to by the Court of Appeal in *Leisure Farm Corp Sdn Bhd v Kabushiki Kaisha Ngu (formerly known as Dai-Ichi Shokai) & Ors* [2017] 5 MLJ 63 where Idrus Harun JCA (as His Lordship then was), stated at p 75 as follows:

> [17] Also cited by learned counsel in the course of his oral submission on this point is this court's decision in the case of *Zulpadli bin Mohammad & Ors v Bank Pertanian Malaysia Bhd* [2013] 2 MLJ 915 in which it was held that the respondent's own admission in the earlier suit as well as the amended statement of claim in the present suit showed that the appellants were innocent victims as much as the respondent was. *The respondent was estopped from taking a position different from that pleaded in its defence in the earlier suit. Clearly, the essential function of judicial estoppel is to prevent intentional inconsistency while the object of the rule is to protect the court from the perversion of judicial machinery. Judicial estoppel seeks to address the incongruity of allowing a party to assert a position in one court and the*

opposite in another tribunal (*Peguam Negara Malaysia v Nurul Izzah bt Anwar & Ors* [2017] MLJU 273). (see also) (Emphasis added.)

Industrial Court proceedings

[50] In the Industrial Court proceedings for wrongful dismissal initiated by Ms Saraswati, the plaintiff's stance was that its employee, Ms Saraswati was negligent for approving the loan facilities. The second defendant argued that by the dismissal on 15 June 2016 of Ms Saraswati who was the Head of the Batu Pahat Business Centre who had approved the banking facilities to STT, the plaintiff had acknowledged and admitted that its own employee was negligent. Mr Koh Sze Buan who was Ms Saraswati's deputy was also dismissed. Further, the show cause letter issued to Ms Saraswati by the plaintiff clearly showed the plaintiff's own position that the banking facilities should not have been recommended or approved at the outset. This is so because if Ms Saraswati had perused the valuation report prepared by the first defendant, she would have been fully aware of the fact that the properties had already been transferred to STT even before the loan application was made and that the purpose of granting the loan facilities of RM4.9m to the borrower STT to part finance the purchase of the properties was unjustified. The show cause letter issued by the plaintiff to Ms Saraswati is as follows:

> *3. Lack of Verification on Land Search Record resulting in Financing granted to Purchase Asset Already Owned by the Borrower*
>
> For the Term Loan of RM4.9 million recommended by you to Sentosa Timber Trading Sdn Bhd *to part finance the purchase of 2 units of 1 ½ storey detached factories* in Taman Industri Sri Sulong under Maxiplan Option III package stated in the A/A 2015JX1045, Audit's findings noted that the SPA was dated 21/5/2014 i.e. a year before the loan applicant and the description of the said property states that the 2 pieces of industrial land are vacant. This contradicted the comments in the A/A on the purpose of the loan. Further, based on the 'Catatan Carian Persendirian' (Land Search records) attached to the Valuation Report dated 20/4/2015 from Messrs Bahari & Co. *the said properties had already been transferred to the borrower, Sentosa Timber Sdn Bhd on 18/8/2014 i.e. 7 months before the loan application date. Thus, the purpose of the Term Loan of RM4.9 million granted to the borrower to finance the purchase of the properties was unjustified.* (Emphasis added.)

[51] The response by Ms Saraswati to the show cause letter admitting her 'negligence' was that there was no SPA given by STT to her and that her failure in scrutinising the valuation report of the properties was due to staff incompetency, hectic schedules, meeting sale targets and urgent issues to be attended by her resulting in her 'lapse' or oversight. The response is as follows:

> At the point of recommending AA 2015JX1045 favouring Sentosa Timber Trading Sdn Bhd, there was no SPA given to us by customer and it was stated in the AA by the originator that the SPA was yet to be signed.

I would normally scrutinize the valuation report but in this case, circumstances which includes staff competency monitoring, hectic schedules, meetings sales target and some urgent issues would have inadvertently triggered this lapse.

[52] The decision to dismiss Ms Saraswati was made approximately over a year before the claim pertaining to this appeal was filed. Her dismissal which was made on the basis of negligence, the Recovery/Debt Action against STT, STT's directors and guarantors and the present action against the first and second defendant under appeal showed the contradictory positions taken by the plaintiff. The dismissal also clearly showed the plaintiff's admission or acknowledgment that its own employee was negligent in granting the banking facilities to STT. There was no suggestion then that the plaintiff was a victim of a fraudulent scheme involving STT, its directors, vendor and the first and second defendants.

The claim is scandalous, frivolous or vexatious and/or an abuse in process

[53] The conduct of the plaintiff in changing its stance in that when it initially filed its recovery/debt action, it was based on STT's indebtedness; then its basis for dismissal of Ms Saraswati including its response to the dismissal proceedings initiated by Ms Saraswati in the Industrial Court proceedings, it was based on its admission of negligence by Ms Saraswati and its last action against the first and second defendants which was based on breach of retainer by the second defendant in wrongfully advising the plaintiff to release the banking facilities to STT without proper verification or investigation on the properties and the allegation of breach of contract, fraud, collusion or conspiracy committed by the first and second defendant with STT as the purchaser of the properties and borrower of the banking facilities and the vendor: all these revealed that the plaintiff's claim under appeal is scandalous, frivolous and/or vexatious and is in fact an attempt by the plaintiff to forum shop and issue switch. In such a scenario, due to the different and opposing stance taken by the plaintiff, the plaintiff should be estopped and the claim should be struck out and dismissed.

[54] In *Re Vernazza* [1959] 2 All ER 200 which was cited with approval by the Supreme Court in *Chung Khiaw Bank Ltd v Tio Chee Hing* [1987] 2 MLJ 701, Lord Parker CJ (as His Lordship then was), stated as follows:

In considering whether any proceedings are vexatious one is entitled to and must look at the whole history of the matter and it is not determined by whether the pleading discloses a form of action. Indeed that is the principle applied under the rules of court when application is made to strike out a pleading. Though the pleading may be in order, the court in its inherent jurisdiction is entitled to look at affidavits as to the history of the matter, and if in the light of the history the action is vexatious, the matter can be struck out and the action dismissed. This is in my judgment a clear case and there must be the order prayed. (Emphasis added.)

[55] The plaintiff's claim is also an abuse of process. We agreed with the contention of the second defendant that the plaintiff's claim is an attempt by the plaintiff to salvage its position in relation to the monies due and owing under the banking facilities. This is so since in the recovery/debt action, the plaintiff had sought to recover RM15,776,694.08 with interest against STT and the directors as monies due and owing under the banking facilities (the 'judgment sum'). The plaintiff failed to recover the judgment sum and had commenced execution proceedings against STT and the directors for the same. The plaintiff then sought to recover from the second defendant the amount outstanding from the judgment sum due and owing by STT, which amounts to RM5,784,473.12 despite the fact that by its own admission through Ms Saraswati, the plaintiff had acknowledged that the losses suffered by them was due to their own employee's negligence in approving the loan facilities to STT without reference to the SPA executed by STT as the purchaser and the vendor and not perusing the valuation report made by the first defendant. The plaintiff has knowledge that the properties were already paid for by STT and registered in the name of STT before the approval by them of the monies for the banking facilities. All these showed that the plaintiff's claim is an attempt to forum shop in the context of a 'tactical manoevre' by a party as seen in *Ismail bin Ibrahim & Ors v Sum Poh Development Sdn Bhd & Anor* [1988] 3 MLJ 348; [1988] 1 CLJ Rep 606. In such a scenario this court has the discretion to strike out the action for abuse of court process.

CONCLUSION

[56] For the reasons enumerated above and after considering the appeal records and the submission of parties, we are unanimous in our view that there are merits in the appeal to warrant our intervention. We therefore allowed the second defendant's application in encl 15 to strike out the plaintiff's claim under O 18 r 19(1)(b), (1)(c) and (1)(d) of ROC 2012. We set aside the decision and order of the High Court dated 3 June 2018 with costs of RM15,000 (here and below), subject to the payment of allocator fees. Deposit, if any, is refunded.

Appeal allowed with costs.

Reported by K Selvaraju